

*United States Court of Appeals
for the Second Circuit*



**INTERVENOR'S
BRIEF**

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74-1319
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IN THE

United States Court of Appeals
For the Second Circuit

WESTINGHOUSE BROADCASTING COMPANY,
INC. (KYW-TV),

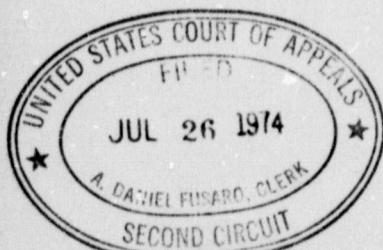
Petitioner,
vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent,
and

THE DIRECTORS GUILD OF AMERICA, INC.,
Intervenor.

**On Petition for Review and on Cross-Application
for Enforcement of an Order of the
National Labor Relations Board**

**BRIEF FOR THE INTERVENOR,
THE DIRECTORS GUILD OF AMERICA, INC.**



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NATIONAL LABOR RELATIONS BOARD,
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THE DIRECTORS GUILD OF AMERICA, INC.,
Intervenor.

**On Petition for Review and on Cross-Application
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National Labor Relations Board**

**BRIEF FOR THE INTERVENOR,
THE DIRECTORS GUILD OF AMERICA, INC.**

Statement of the Issues

1. Whether the Regional Director and the National Labor Relations Board correctly determined that local television Directors, who do not possess any supervisory or managerial authority whatsoever, are "employees" within

the meaning of the Act and thereby constitute a unit appropriate for the purposes of collective bargaining.

The instant case has not heretofore been before this Court under the same or similar title.

References to Parties and Rulings

The questions presented for review before this Court were raised by a Decision and Order of the National Labor Relations Board, which Decision and Order is reported at 209 NLRB No. 121.

Said Decision and Order was made pursuant to a motion for Summary Judgment on a Complaint alleging a violation of Section 8(a)(5) of the National Labor Relations Act in a case which is known upon the records of said Board as Case No. 4-CA-6581.

The questions presented to said Board pursuant to said Complaint were raised by a Decision and Direction of Election issued by the Regional Director of the Fourth Region of said Board in a case known upon the records of said Board as Case No. 4-RC-10351.

The Petitioner herein, Westinghouse Broadcasting Company, was the Respondent in Case No. 4-CA-6581 and was the Employer in Case No. 4-RC-10351.

The Intervenor herein, the Directors Guild of America, was the charging party in Case No. 4-CA-6581 and was the Petitioner in Case No. 4-RC-10351.

Statement of the Case

This case is before the court upon the Petition of Westinghouse Broadcasting Company, Inc. (KYW-TV), to review, and upon the cross-application of the National Labor Relations Board to enforce, an Order of the National Labor Relations Board issued on March 19, 1974 and reported at 209 NLRB No. 121.

This Court has jurisdiction pursuant to Section 10(f) of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. Sec. 151, *et seq.*).

Statement of the Facts

On 30 April 1973 the Directors Guild of America, Inc. filed a Petition with the Fourth Region of the National Labor Relations Board in Case No. 4-RC-10351 seeking certification as the collective bargaining representative for a unit of television Producer-Directors employed by the Westinghouse Broadcasting Company television station KYW-TV in Philadelphia.

Westinghouse Broadcasting Company opposed the Petition and alleged that the Directors were either supervisors or managerial employees and, thereby, did not constitute an appropriate bargaining unit.

On June 5 and 11, 1973 a hearing was held before Hearing Officer Alexander Graham. Both parties were represented by counsel, had an opportunity to call witnesses, examine and cross-examine them, adduce testimony, argue orally on the record and submit briefs.

On 23 July 1973, Regional Director Samoff, in issuing a Decision and Direction of Election held that the Producer-Directors employed by KYW-TV were neither supervisors nor managerial employees within the meaning of the Act. The Regional Director, consequently, directed that an election be held.

On 3 August 1973 Westinghouse Broadcasting Company filed a Request for Review of the Regional Director's Decision with the National Labor Relations Board. On 21 August 1973 the Board denied the Request for Review.

On 22 August 1973 an election was held and the Directors Guild of America was unanimously selected as the collective bargaining representative by the Directors at KYW-TV. Thereafter, the Guild was certified by the Board and formally requested that the Company meet with the Guild so as to begin bargaining.

On 7 September 1973 and at all times thereafter the Company has refused to bargain with the Guild and on 25 September 1973 the Guild filed an unfair labor practice charge alleging a violation of Section 8(a)(5) of the National Labor Relations Act.

Following investigation of the charge, the Regional Director for the Fourth Region found probable cause to believe that the Company had violated the Act and issued a Complaint on 16 October 1973.

Upon request made by the Directors Guild, Counsel for the General Counsel filed directly with the Board a Motion for Summary Judgment on the Complaint dated 3 December 1973.

In its Decision and Order dated 19 March 1974 the Board granted the Motion for Summary Judgment, affirmed the findings and conclusions of the Regional Director, and ordered the Company to bargain with the Directors Guild.

On 20 March 1974 the Company petitioned this Court for review of that Decision and Order. Thereafter, the National Labor Relations Board filed a cross-application for enforcement and the Directors Guild intervened.

The additional facts bearing upon the issues herein are such that they can best be brought forth in the course of argument. They will, therefore, be developed under that heading in this brief.

ARGUMENT

Directors at local television stations are not "supervisors" within the meaning of the National Labor Relations Act.

"To reach a conclusion upon the complaint under consideration against the company of unfair labor practices, violating Sections 8(a)(1) and 8(a)(5) of the National Labor Relations Act, the validity of the Board's decision as to the appropriate unit must be decided." *Pittsburgh Plate Glass Co. v. NLRB*, 313 U.S. 146, at 152 (1941).

The Company urges this Court to relieve it from its NLRB-ordered obligation to bargain with the Directors Guild of America. The Respondent and the Intervenor request that this Court enforce the NLRB order, which Order is based on the Board's determination that television

Directors employed at local television stations such as KYW-TV are neither "supervisors" nor "managerial employees."

By definition, a supervisor is a person having authority, in the interest of an employer, to hire, fire, discipline or take certain other personnel actions with respect to other employees, or effectively to recommend such action.

That there may be some well-known and highly paid film and network television Directors who are clearly supervisors within the meaning of the Act is not disputed, notwithstanding the fact that the Directors Guild represents most motion picture Directors and all Directors at all television networks.

However, the alleged "supervisory authority" of Directors employed by local television stations such as KYW-TV is either non-existent or illusory, such that local television Directors are *not* true supervisors within the meaning of the Act. At local television stations Directors do not possess any of the authorities necessary to confer "supervisory status" upon them and the Directors employed by KYW-TV are not supervisors and are, therefore, entitled to the protection of the Act.

(A) Local television Directors do not have "authority responsibly to direct" employees within the meaning of the National Labor Relations Act.

Section 2(11) of the Act enumerates the twelve specific criteria designated by Congress to test the status of an alleged supervisor. The testimony in the underlying RC Case revealed that the KYW Directors neither have nor

believe themselves to have the authority: "(1) to hire, (2) to transfer, (3) to suspend, (4) to lay off, (5) to recall, (6) to promote, (7) to discharge, (8) to assign, (9) to reward, (10) to discipline employees, or (12) to adjust their grievances." Neither do they have nor believe themselves to have the authority "effectively to recommend such actions."

The KYW-TV Directors do not possess *any* of the supervisory authorities enumerated in Section 2(11) with regard to the power to *make changes in the status of personnel*. Almost by definition, however, it would seem that Directors do have authority "(11) responsibly to direct employees." In fact, they do not "direct" employees within the meaning of the Act.

Admittedly, a person with such responsibility without having any other supervisory authority, is nevertheless a supervisor. *Ohio Power & Light Company v. NLRB*, 176 F.2d 385 (6th Cir., 1949). However, the unique factual situation which exists at almost all local television stations brings television Directors within the coverage of the Act for the reason that they are *not* true supervisors.

At times the KYW Directors instruct cameramen, talent or stage managers, but their instructions are of an artistic nature and are always subject to the instructions or approval of their own supervisors: The Producer, the News Department Director, the Production Manager, the Executive Producer, the Program Manager, and, ultimately, the Station's General Manager. These men are the true supervisors, not the Directors. These men prepare the scripts, the formats, the budgets. These men hire, fire, reward,

promote and discipline, not the Directors. Notwithstanding Company testimony, it remains abundantly clear that the Production Manager, Executive Producer and Program Manager closely supervise the Directors and "the direction of employees which is, thus, so closely scrutinized and supervised by a supervisor, does not meet the 'responsibility to direct' provision of Section 2(11) of the Act." *Directors Guild of America*, 198 NLRB No. 103 (1972); Affirmed, — F.2d —; 85 LRRM 2800 (9th Cir., 1974).

"The only exercise of discretion by . . . a Director when he directs a show, involves artistic judgment and not personnel supervision. It is well established that this is not a supervisory function." *NLRB v. Capital Transit Company*, 221 F.2d 864 (D.C. Cir., 1955).

In *Puget Sound Power & Light Company* (40 LRRM 1097; 1957) the Board held that employees who exercised some seemingly-supervisory functions were *not* supervisors because they had no responsibility beyond projects specifically assigned to them. Whatever authority a local television Director may have, it is limited to artistic and creative judgments and further limited to a specifically assigned project, one particular television program. The Directors have no authority or responsibility whatsoever at KYW-TV beyond those television programs to which they have been specifically assigned, thus bringing them within the coverage of *Puget Sound*.

There is no supervisory relationship between television Directors and other personnel, because a Director's responsibility involves "only their obligations with respect to the development of their own work product and how it fits into

the broadest schedule . . . and not with respect to the direction or control of the activities of other employees." *Post-Newsweek Stations* (203 NLRB No. 91; 1973).

Further, the Act adds a general qualification under the tests enumerated in Section 2(11): ". . . if in connection with the foregoing, the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment".

The United States Court of Appeals for the First Circuit held it not of consequence that alleged supervisors possess authority to use their independent judgment with respect to some aspects of their work—the decisive question being whether they possess authority to use their independent judgment in the exercise of the specific criteria of Section 2(11). *NLRB v. Brown and Sharpe Mfg. Co.*, 169 F.2d 331 (1st Cir., 1948). At local television stations, the Directors do not. The evidence shows that at KYW the Production Manager, Executive Producer and Program Manager plan the programs and the Director works within their plan and follows their instructions. On a news program, for example, the Production Manager picks and assigns the Director and the technical crew, the Assignment Editor assigns reporters, and the News Producer or News Editor writes the script, sets the opening, contents and closing, determines which news stories are to be included and which excluded, and has the ultimate authority for the program. Thus, as Board Member Peterson argued in his dissent: The Director's duties "make him a human conduit for the transmittal of the Producer's instructions to the (floor men or stage managers) and technicians. Although in this sense he may be said to be giving orders to other

employees, actually he merely passes along the instructions given to him by the Producer and sees that the work is performed in a proper manner". *WTOP, Inc.* (114 NLRB No. 194; 1955).

The United States Court of Appeals for the Eighth Circuit decided *NLRB v. Little Rock Downtowner, Inc.*, 414 F.2d 1084 (8th Cir., 1969), which concerned an employee who "was responsible for physical maintenance of an entire motel, hired painters on a contract basis, negotiated the cost to the Company, directed the progress of the work, decided what rooms were to be painted, and exercised discretion in purchasing supplies." However, because the employee could not hire painters without authorization of the motel innkeeper, and the innkeeper made the payments to the painters and determined how the rooms would be painted, the Court upheld the determination by the NLRB that such an employee was *not* a supervisor. The evidence in *Little Rock* was substantially stronger in showing alleged supervisory status than the evidence adduced in this case.

Because "ultimate determination of supervisory status depends upon close scrutiny of the job actually performed by the employees in question", a review of the decided case in this area is necessary clearly to reveal that the facts which exist at KYW-TV are insufficient to confer supervisory status upon the KYW Directors. *Arizona Public Service Company v. NLRB*, 453 F.2d 228 (9th Cir., 1971).

In *Great Western Broadcasting-KXTV* (192 NLRB No. 176; 1971), the Board disallowed a unit of television Directors because they had "full responsibility from planning stage through presentation over the air". The transcript reveals that such is absolutely not the case at KYW.

In *Westinghouse Broadcasting Company-WJZ-TV* (195 NLRB No. 63; 1972), the Board disallowed a unit of news producers because they had "overall responsibility for bringing the whole package together . . . responsibility for the content of the program, the structuring of the program, the timing of the program and the placement of commercials within the program. It is the news producers and not the director or his assistant who are responsible for the immediate day-to-day supervision of the cameramen, reporters, film processors and film editor". Exactly the same structure exists at KYW, with the News Producers, Production Manager and Program Managers, and Engineering Department supervisors, not the Directors, responsible for day-to-day supervision.

In *Newhouse Broadcasting Corporation-WAPI-TV* (192 NLRB No. 60; 1972), the Board held that assistant chief engineers were supervisors solely because they had "authority responsibly to direct". But this authority, the Board held, was indicated by the fact that these supervisors planned and posted work schedules, investigated problems and questioned technicians, had authority to schedule technicians to work on their days off, had authority to check time sheets, and had authority to see that work schedules were followed. Directors have no such authority at KYW-TV.

In *Eastman Broadcasting Company* (188 NLRB No. 13; 1971), the Board again found that chief engineers were supervisors, based on their authority to schedule days and hours of work, authority to assign overtime work, authority to check the accuracy of employee time records, author-

ity to interview job applicants and to recommend their hire. Again, Directors have no such authority at KYW.

In *Westinghouse Broadcasting Company-KPIX-TV* (188 NLRB No. 24; 1971), the Board ruled that news producers were supervisors because they were "completely responsible for the content of their programs". Their duties included assignment of news reporters, selection and employment of talent, final review of scripts, supervision of the work of film processors, securing replacements for absent employees, assignment of overtime work, determination of company policy, company personnel requirements, evaluation of current personnel and planning for future manpower utilization. As the testimony in the underlying RC Case revealed, at KYW the Directors have none of the rights, privileges, or authorities present in *Great Western, Westinghouse, Newhouse and Eastman*.

In *Arizona Public Service Company (supra)* the ultimate determination of supervisory status turned solely on the "responsible to direct" provision. But in *Arizona*, the alleged supervisors: "had complete control over the Company's electrical system". They were actually the only supervisors in the Company, such that "if these employees were not supervisors, then the Company system operates without supervisors". No such overwhelming authority exists at KYW, where the Company admits that the Directors are supervised by the Production Manager, Executive Producer, Program Manager, and the General Manager.

In *WTOP, Inc.* (114 NLRB No. 194 at 1237) the Board described the duties necessary to find supervisory status:

"The director assigned to a particular show has overall responsibility for that program. His pre-show responsibilities include the creation and placement of sets; the rehearsal of performers for the show and the commercials; the arrangement of lights, cameras and microphones; the selection and editing of films; and the timing of the show. During the presentation of the show the director gives instructions on the studio intercommunication circuit and in the control room, issuing cues for the performers and directing audio men as to the intensity of sound, cameramen as to where to direct the cameras, and switchers as to which image to broadcast."

At KYW, it is the News Editor or Executive Producer or the Program Manager, not the Director, who have *true* overall responsibility for the programs. The Art Department, rather than the Director, creates and places the sets. The Director merely requests sets, pursuant to the Executive Producer's approval or orders. The Directors do not rehearse talent or commercials. The News Producer selects and edits all films.

The Director may occasionally instruct the audio men as to the intensity of the sound or tell the cameramen where to point the camera. Even these minimal "directions," however, are made either pursuant to the producer's explicit prior instructions or subject to his approval and changes. In fact, at KYW Directors cannot even instruct the switchers as to which image to broadcast because at KYW there are no switchers and the Director must do the physical switching himself, manually pushing the buttons on a computerized control panel.

Not only do local television Directors at KYW lack any of the Congressionally-enumerated authorities necessary to confer supervisory status upon them, neither do they satisfy any of the various so-called "secondary tests": Directors do not consider themselves to be supervisors, nor do the technicians, cameramen, audiomen, producers, associate producers, news editors, stage managers or talent with whom they work consider Directors to be supervisors. Directors do not believe themselves to have the authorities the Company claims they have, and have never attempted to exercise such authorities.

Directors do not exercise privileges accorded only to supervisors, nor attend meetings of supervisors or department heads. Directors are at the bottom of a long chain of personnel command and receive their instructions from line supervisors rather than management officials. Directors are not responsible for inspecting the work of others, nor for keeping time, work or production records on other employers. Despite their admitted skill, Directors receive *substantially less* pay than admitted supervisors. Directors receive even *substantially less* pay than the hourly-paid technicians whom they allegedly supervise.

The Company argues that Directors are physically present at KYW at times (mornings, nights and weekends) when admitted supervisors are absent. The Company argues that Directors can keep technicians working on an overtime basis so as to finish a show that is running late. The Company argues that Directors might secure replacements for missing technicians or instruct, for example, a lighting technician to change the lighting arrangements for one particular show. The Company argues that Directors

make voluminous "reports" on the competence or efficiency of technical employees. The Company contends that such things make the Director a supervisor.

Even if the Company's arguments are factually true, its contention is utterly mistaken:

"Further, in support of its supervisory contention, the employer points to the fact that the (Directors) do have certain responsibilities that bear directly on the work schedules of other employees. Thus, for example . . . it is the (Director's) responsibility at all times when conceded management representatives are not present to locate a substitute pursuant to instructions or procedures previously specified by such management members . . . even though it may in some cases involve (another employee) working overtime. However, we find no indication of supervisory authority here . . . Rather, the (Director's) role seems wholly limited to bringing a situation requiring some action to the attention of employees in a position to deal with it, and whether they do so or not appears to be their own decision, not his, made in light of what they consider are their own job responsibilities.

Further, the Company argues that the Directors 'have supervisory authority because they are expected to and in fact do, wield disciplinary power. But all the record shows in this regard is that (Directors) at times have freely relayed to management their feelings concerning an employee's competence or reliability on the job and that on occasion management has sought out their opinion with respect to such matters. There is no evidence that any employee has ever been discharged or disciplined solely on the basis of a (Director's) recommendation or complaint concerning his job performance. Rather, it is clear that (a Director's) opinion or recommendation is but one source of

information considered by management in evaluating an employee. Further, the record shows that on several occasions (Directors) have declaimed loud and long on the alleged serious short-comings of various employees without management, at least for any considerable period of time, taking any action whatsoever to deal with the matter. In these circumstances, we find that the (Directors) do not make effective recommendations concerning discipline or changes in the job status of employees.

In light of the above, we find that they are not supervisors under Section 2(11) of the Act."

Post-Newsweek Stations, 203 NLRB No. 91 (1973).¹

(B) The Regional Director of the NLRB's Fourth Region correctly determined that local television Directors at KYW-TV are neither "supervisors" nor "managerial employees" within the meaning of the Act.

The Directors Guild of America represents Producer-Directors for the purpose of collective bargaining at WABC, WCBS, WNBC, WNET, WPIX, WOR, Hughes Television Network, Children's Television Workshop, WNJU, WNYC, WNYE, WSNL (New York); WNAC (Boston); WCAU (Philadelphia); WMAL, WETA, WRC (Washington); WWJ, WXYZ, CKLW (Detroit); WLS, WFLD, WMAQ, WBBM (Chicago); WKYC (Cleveland); KMOX (St. Louis); KGO (San Francisco); and KCET, KHJ, KNBC, KABC (Los Angeles).

1. *Post-Newsweek* involved News Editors. Intervenor believes, however, that the logic of the Board's reasoning applies similarly to Directors. Consequently the parenthesized word (Directors) has been inserted for the words "news editors" appearing in the original.

At each of the above-noted television stations the Guild was selected by consent election or was recognized without opposition upon request.

However, when the Directors employed by the Westinghouse Broadcasting Company affiliate in Philadelphia (KYW-TV) requested that the Guild serve as their collective bargaining representative, the Company declined the Guild's request for recognition.

Accepting that local television Directors such as those employed by the local Westinghouse stations were in dire need of collective representation, and believing that such local television Directors were entitled to the rights and protections of the Act, the Guild undertook to secure for them the right of protected self-organization by filing an election Petition with the NLRB's Fourth Region, seeking certification as the collective bargaining representative.

In the underlying Representation Case (Case No. 4-RC-10351), Regional Director Samoff directed an election based on his finding that local television Directors are not supervisors within the meaning of the Act for, in part, the following reasons:

"Employer contends that the Producer-Directors responsibly direct unionized technicians in the production unit. The record does not substantiate this. No Producer-Director has the authority to hire, fire, grant wage increases or time off, adjust grievances, or in any other way affect these employees' working conditions. Assignments of production unit technicians to particular programs are made by the Production Manager. Employer argues, however, that the Producer-Director can change the technicians' job assignment. None of

the testifying Producer-Directors were aware of this authority and none has exercised it. Indeed, the assignment made by the Production Manager specifies the jobs to be performed by the individual technicians. Only in emergency circumstances can a Producer-Director bar an employee from the studio, i.e., a drunk technician. Further, Employer contends that the Producer-Directors have the authority to direct production unit employees to work overtime. Record evidence establishes that under normal conditions Producer-Directors must get their superiors' approval to have production unit employees work overtime. In the unusual situation where the station's programs are running late because of some special program or event, he informs the technicians that they will have to work overtime.

"Producer-Director instructions to the technicians during the course of the program, (when he is not acting as a conduit for the news producer) are purely of an artistic nature and do not relate to the actual operation of the equipment or the manner in which the operations are to be carried out. They exercise no control over how technicians carry out their (Producer-Director's) general instructions. Further, the vast majority of the technicians in the production unit are highly skilled (60-80% are paid the highest union scale). Moreover, most Producer-Directors earn between approximately \$10-12,000 whereas most technicians are paid approximately \$16,000. Consequently, I find no basis for the Employer's contention that Producer-Directors responsibly direct employees as defined by Section 2(11) of the Act. Employer further contends that the Producer-Directors effectively make recommendations about the technicians' performance which may cause disciplining or termination of probationary employees.

"Only one of the four testifying Producer-Directors said he made reports about the performance of techni-

cians. This Producer-Director had been requested to make written reports concerning errors that occurred in the technical presentation of news programs. As a consequence, he discussed the various abilities of the assigned production unit technicians. However, his requests that a particular cameraman not be assigned to his program were not granted by his superiors. Further, the record establishes that at best the Producer-Director's opinion or recommendation is but one source of information considered by management in evaluating technicians. The evidence fails to establish that any technician has ever been discharged or disciplined solely on the basis of a Producer-Director's recommendation or complaint concerning his job performance. In these circumstances, I find that the Producer-Directors do not recommend effectively discipline or changes in the job status of employees.

"Finally, Employer argues that Producer-Directors occupy a key position requiring considerable personal responsibility, individual initiative and good judgment. Further that the failure of the Producer-Director to perform his work can have disastrous consequences for the station since they have the last control over the program before it is transmitted. Although these employees may occupy key positions and have extensive discretion and personal responsibility, it extends only to their own work product, and not with respect to the direction or control of the activities of other employees. Therefore, this does not indicate supervisory authority.

“Based upon the foregoing and the record as a whole, I find and conclude that Producer-Directors do not responsibly direct employees or otherwise exercise or possess sufficient indicia of supervisory authority warranting a finding that they are supervisors as defined in the Act. Accordingly, they constitute a unit appropriate for the purposes of collective bargaining”.

Neither did the Company adduce any evidence to show that the Directors are "managerial" employees, closely related to the management of the Company. A managerial employee directs and controls employees from an administrative and management point of view. This is not equivalent to artistic direction or esthetic judgment. By telling a cameraman to pan the camera from stage left to stage right, a Director is not "attaching himself to accomplishing the administrative goals of the Company". At KYW-TV, Directors do not "formulate and effectuate management policies by expressing and making operative the decisions of their employer". *Palace Laundry* (75 NLRB 320; 1947).

Rather, they merely direct a television program. A television program which has been written by someone else, with actors hired by someone else, using technicians hired, supervised and assigned by someone else. The length of the program they direct is chosen by others, as is the time that the program is broadcast. The Director is an artist, not a supervisor.

(C) Congress never intended to exclude employees with jobs similar to those of local television Directors from the coverage and protections of the Act.

As previously noted, Section 2(11) of the Act provides:

"(11) The term 'supervisor' means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, award, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such au-

thority is not of a merely routine or clerical nature, but requires the use of independent judgment."

When the 80th Congress began considering the amendments to the National Labor Relations Act which led to the Labor Management Relations Act of 1947, the version introduced and passed in the House of Representatives as H.R. 3020 suggested the following definition of a "supervisor":

"(12) The term 'supervisor' means any individual—

 "(A) who has authority, in the interest of the employer—

 "(i) to hire, transfer, suspend, lay off, recall, promote, demote, discharge, assign, reward, or discipline any individuals employed by the employer, or to adjust their grievances, or to effectively recommend any such action; or

 "(ii) to determine, or make effective recommendations with respect to, the amount of wages earned by any individuals employed by the employer, or to apply, or to make effective recommendations with respect to the application of, the factors upon the basis of which the wages of any individuals employed by the employer are determined, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the exercise of independent judgment;

 "(B) who is employed in labor relations, personnel, employment, police, or time—study matters or in connection with claims matters of employees against employers, or who is employed to act in other respects for the employer in dealing with other individuals employed by the employer, or who is employed to secure and furnish to the employer information to be used by

the employer in connection with any of the foregoing;
or

“(C) who by the nature of his duties is given by the employer information that is of a confidential nature, and that is not available to the public, to competitors, or to employees generally, for use in the interest of the employer.”

The version introduced in the Senate as S. 1125, defined a “supervisor” as:

“(11) The term ‘supervisor’ means any individual having authority in the interest of the employer to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or to adjust their grievances, or effectively to recommend such action if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.”

The final version passed by the Senate, following the Conference Committee report, defines “supervisor” as:

“(11) The term ‘supervisor’ means any individual having authority, in the interest of the employer to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibility to direct them, or to adjust their grievances, or effectively to recommend such action if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.”

The Act’s definition of the word “supervisor” is almost identical to that ultimately passed by the Senate, and it

is in the Senate's version that the phrase "or responsibility to direct them" was first introduced.

If local television Directors at KYW are "supervisors" their status as such turns, as previously noted, on the "responsibly to direct" provision of the Act. In deciding this case, therefore, it is necessary to consider the reason for the insertion of the phrase "responsibility to direct" in defining the word "supervisor."

With the legislative history of Section 2(11) of the Act considered, it becomes apparent that Congress never intended to include as "supervisors" people with duties similar to those of local television Directors, despite the oft-repeated assertion of Westinghouse Broadcasting Company to the contrary.

The motivations behind Westinghouse's contention are unknown to the intervenor, but, perhaps, not unknown to Congress when considering the definition of "supervisor":

From the Congressional Record, Senate, April 28, 1947, page 4260:

"Mr. Aiken. The committee then more closely defined the word 'supervisor,' to include supervisors in fact, rather than all the other groups of employees whom some employers would like to have had included in the list of supervisory employees, so that such employees would not be able to join the union and gain the benefits of the Labor Relations Act."

The words "or responsibly to direct" were first inserted during the Senate's consideration of the Conference Com-

mittee report. The Congressional Record, Senate, on May 7, 1947 (93 Cong. Rec. 4777) contains the following discussion:

“The President pro tempore. The Chair suggests to the Senator that the Junior Senator from Vermont (Mr. Flanders), in the understanding of the Chair, desires to present a very brief amendment at this time. As a matter of personal convenience to the Senator from Vermont, would there be any objection on the part of the Senator from Minnesota?

“Mr. Ball. Mr. President, I ask unanimous consent that the pending amendment be temporarily laid aside to permit the Senator from Vermont to offer his amendment.

“The President pro tempore. The Chair thanks the Senator, and recognizes the Senator from Vermont.

“Mr. Flanders. Mr. President, I rise to offer a simple amendment to Senate bill 1126. The amendment is to insert the words ‘or responsibly to direct them’ after the word ‘employees’ on page 6, line 20. Paragraph (11) would then read:

“ ‘The term “supervisor” means any individual having authority in the interest of the employer to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.’

“As an employer for many years past, and until I resigned to enter this body, I can say that the definition of ‘supervisor’ in this act seems to me to cover ade-

quately everything except the basic act of supervising. Many of the activities described in paragraph (11) are transferred in modern practice to a personnel manager or department. The supervisor may recommend more or less effectively, but the personnel department may, and often does, transfer a worker to another department on other work instead of discharging, disciplining or otherwise following the recommended action.

"In fact, under some modern management methods, the supervisor might be deprived of authority for most of the functions enumerated and still have a large responsibility for the exercise of personal judgment based on personal experience, training, and ability. He is charged with the responsible direction of his department and the men under him. He determines under general orders what job shall be undertaken next and who shall do it. He gives instructions for its proper performance. If needed, he gives training in the performance of unfamiliar tasks to the worker to whom they are assigned.

"Such men are above the grade of 'Straw Bosses, lead men, set-up men, and other minor supervisory employees', as enumerated in the report. Their essential managerial duties are best defined by the words, 'direct responsibly', which I am suggesting.

"In a large measure, the success or failure of a manufacturing business depends on the judgment and initiative of these men. The top management may properly be judged by its success or failure in picking them out and in backing them up when they have been properly selected.

"Mr. President, I have not heard at any time in the discussion of this bill what seems to me an adequate explanation of the reasons for removing this supervisory force from the area of collective bargaining.

The reasons are simple and direct. Unless the employer can hire, and discharge, promote, demote, and transfer these men, he has lost the control of his business. He cannot run it effectively. If he cannot run it effectively and efficiently, he cannot continue in business profitably. If he cannot operate profitably, he is a bad manager, not only from the stockholders standpoint, but also from that of the working force as well. Only the profitable business can furnish sustained employment at good wages. At this point the interests of stockholders and employees are identical.

"Mr. President, I assume I must ask unanimous consent to offer this amendment.

"The President pro tempore. No; the Senator is entitled to offer his amendment.

"Mr. Flanders. I offer the amendment.

"The President pro tempore. The Senator from Vermont offers an amendment, which the clerk will state.

"The Chief Clerk. On page 6, line 20, after the word 'employees', it is proposed to insert 'or responsibility to direct them'.

"The President pro tempore. The question is on agreeing to the amendment submitted by the Senator from Vermont.

"Mr. Taft. Mr. President, this merely adds to the definition of the word 'supervisor'. The definition in the bill is that which has been used by the National Labor Relations Board for the past 4 or 5 years; but I have no objection certainly to including the words 'or responsibility to direct them'. I do not think I can accept the amendment for the committee, but it is

entirely satisfactory, I am sure, to all members of the committee.²

"The President pro tempore. The question is on agreeing to the amendment offered by the Senator from Vermont.

"The amendment was agreed to."

From the transcript in the underlying Representation Case, it appears that although the Westinghouse Area Vice President, the General Manager, and, perhaps, the Program Department Manager are the *ultimate* supervisors, the Executive Producer, the News Department Director and the News Producers, the Engineering Department Supervisor and the Production Manager are the line supervisors, the people who (in Senator Flanders' words) exercise "the basic act of supervising". While the actual power to "hire" or "fire" an employee may be vested only in the General Manager, the line supervisors are the people who perform the day-to-day basic supervision of employees. Although a Director at KYW may tell a cameraman to "zoom" in for a close shot, both the cameraman and the Director are closely supervised employees . . . rewarded, promoted, transferred, assigned and disciplined by the line supervisors. It is not conceivable that a Director, by tell-

2. The amendment as offered by Senator Flanders read: "Or *responsibly* to direct them". In replying to Senator Flanders, Senator Taft misstated the offered amendment as "or *responsibility* to direct them". The clerk, in reading the proposed amendment, read it as "or *responsibility* to direct them". Nowhere in the legislative history of the Act is there an explanation as to why the Act itself has been worded "responsibly" rather than "responsibility". Intervenor assumes that when the final approved version of the Act was drafted for printing, the drafter merely inserted Senator Flanders' original "responsibly" for the misstated "responsibility". For the purposes of this brief, however, the difference is neither material nor relevant.

ing a cameraman to "zoom" in for a close shot so that the picture which is ultimately broadcast looks more artistically pleasing is thereby supervising that cameraman. Intervenor submits that such directorial instructions could not possibly be considered under any reading of the Flanders' amendment, to constitute "the basic act of supervising."

As the Board held in its *Post-Newsweek Stations* Decision (203 NLRB No. 91; 1973):

"It is no doubt true, as the Employer argues, that this work . . . involves considerable personal responsibility, individual initiative and good judgment and that any failure of (a Director) to perform his work properly will have an adverse effect on the quality of the news product broadcast by the station.

"Nevertheless, the excellence and great responsibility required of (the Directors) involves only their obligations with respect to the development of their own work product and how it fits into the formulation of the broadcast schedule and the station's scheme of operation, and not with respect to the direction or control of the activities of the other employees. Consequently, it does not reflect supervisory status".

It is clear that the KYW Directors do not have "responsibility to direct employees" within the meaning of the Act and are, thus, not supervisors within the meaning of the Act. They are, consequently, entitled to the rights of protected self-organization and collective bargaining through their unanimously-chosen bargaining representative.

Conclusion

For the foregoing reasons the Intervenor respectfully requests that the petition to review be denied, that the cross petition for enforcement be granted and that the petitioner herein be directed to bargain with the Directors Guild of America, Inc.

Respectfully submitted,

ALAN S. GORDON
Associate General Counsel
Attorney for Intervenor,
The Directors Guild of America, Inc.

August 1, 1974

Affidavit of Service by Mail

In re:

Westinghouse Broadcasting Co. Inc. v. N.L.R.B.

State of New York
 County of New York, ss.:

..... George Cummings.....
 being duly sworn, deposes and says, that he is over 18 years of age.
 That on July 26, 197....., he served 3 copies of the
 within Brief..... in the above named matter
 on the following counsel by enclosing said three copies in a securely
 sealed postpaid wrapper addressed as follows:

Kelley Drye Warren Clark Carr & Ellis, Esqs.
Attorneys for Petitioner
350 Park Avenue
New York, N.Y. 10022

Peter G. Nash, Esq.
General Counsel National Labor Relations Board
Attorney for Respondent
1717 Pennsylvania Avenue
Washington, D.C. 20570

and depositing same in the official depository under the exclusive care and custody of the United States Post Office Department within the City of New York.

and depositing same at the Post Office located at Howard and Lafayette Streets, New York, N. Y. 10013.

George Cummings

Sworn to before me this 26 th
 day of July 1974

JACK A. MESSINA
 JACK A. MESSINA
 Notary Public, State of New York
 No. 30-2673500
 Qualified in Nassau County
 Cert. Filed in New York County
 Commission Expires March 30, 1975

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